The Walt Disney Company

December 11, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, N.W., Rm. TWB204
Washington, D.C.

Dear Ms. Salas:

On behalf of The Walt Disney Company's wholly-owned subsidiary ABC, Inc., transmitted herewith for filing with the Commission are an original and four copies of its Comments in CS Docket No. 98-201, RM No. 9335 and RM No. 9345.

If there are any questions in connection with the foregoing, please contact the undersigned.

Very truly yours,

Diane H Davidson

Diane Hofbauer Davidson

DHD/smk
Enclosures

c/o Disney Worldwide Services, Inc. / 1150 17th Street, NW / Suite 400 / Washington, DC 20036 / 202-223-8022 / Fax 202-223-8029

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

To: The Commission

COMMENTS OF THE WALT DISNEY COMPANY

("ABC")

The Walt Disney Company, on behalf of its subsidiary ABC, Inc. ("ABC"), hereby submits its comments in response to the Notice of Proposed Rule Making in the above-entitled proceeding. [1] ABC owns and operates, directly or through wholly-owned subsidiaries, the ABC Television Network, ten television stations and 35 radio stations.

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[1] CS Docket No. 98-201, Notice of Proposed Rule Making, RM No. 9335 and RM No. 9345, FCC 98-302 (released November 17, 1998) ("NPRM").

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INTRODUCTION AND SUMMARY

ABC strongly supports the Commission's efforts to ensure that free over-the-air broadcast network television is available to all Americans, no matter where their homes are located. While these comments are intended to forcefully articulate our views that the Commission does not have the legal authority required to interpret or modify the Satellite Home Viewer Act, ABC hopes nonetheless to be helpful to and supportive of the Commission's efforts to address effectively the complex issues raised in the NPRM. To that end, these comments will also identify and describe a practical and attainable solution to the problematic issues identified by the FCC in the NPRM.

The Commission has initiated this proceeding in response to requests from the National Rural Telecommunications Cooperative ("NRTC") and EchoStar Communications Corporation ("EchoStar") that ask the Commission to expand the definition of "unserved household" in a manner that would allow satellite carriers to import distant network signals to a significantly increased number of households. ABC submits that the Commission simply does not have the jurisdiction to comply with this request. Even if the Commission had the requisite legal authority, it should not change the Grade B standard.

The SHVA is administered by the Copyright Office and enforced by the courts. Neither in its original enactment, nor in its 1994 revision and renewal, did Congress vest any power in the FCC to administer or interpret the SHVA. Although Congress adopted the FCC's Grade B standard for the statute, that alone does not give the FCC authority to revise the meaning of the law. The Commission is without any authority to take the action proposed in the NPRM, and in

any event, such action would be an unnecessary intrusion in light of the fact that the SHVA is due for review and possible renewal by Congress in 1999.

Any attempted modification to the codified definition of "Grade B signal intensity" that decreases the copyright protection for local broadcast stations is completely contrary to the specific language of the Satellite Home Viewer Act[2] ("SHVA") and the carefully crafted legislative balance Congress there struck among the interests of satellite carriers, copyright owners, local television stations and the viewing public. In addition, by disturbing that balance, the Commission would cause serious harm to local network affiliates -- the backbone of the free, over-the-air television industry -- and may ultimately reduce the amount of local network programming available to the American public.

In addressing the NPRM and the issues raised by the NRTC and EchoStar petitions, we urge the Commission to bear in mind two principles. The first principle -- one that ABC strongly supports -- is to advance the FCC's important public policy objective of ensuring that free over-the-air television is and remains available to all Americans. At a time when consumers are being asked to pay more for everything, the preservation of free broadcast service to all Americans should continue to be viewed as a fundamental tenet of mass media public policy. The second is to reject proposals that would erode the local service areas of free broadcast television stations, ultimately disserving the public interest by undermining the economic viability of those local broadcast stations. Because it would quite clearly accomplish the latter, any proposed action that attempts to modify the statutory definition of "unserved households" as NRTC and EchoStar

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[2] 17 U.S.C. §119 (1998).

request should be rejected by the Commission in its resolution of this proceeding.

Moreover, this is not an instance where immediate FCC action is needed to address an important matter of public policy. To the contrary, Congress itself must soon address the issue of the continuation and scope of the SHVA, and while there are appropriate public policy solutions for the issues raised, only the Congress can fashion them. The clear right answer is to make more local broadcast signals available to the public through multichannel delivery systems competitive with cable television systems in a manner that maintains the significant benefits of localism in broadcast television and protects the legitimate interests of the copyright owners. But this is a balance that only Congress can address. Only Congress can establish the parameters that would give satellite carriers a compulsory license to deliver the programming of the local network broadcast station's signal to households in that local station's market, thereby achieving the appropriate balance between copyright principles and the element of localism needed to preserve the economic viability of free over-the-air television.

The local- into-local solution best serves all constituencies by allowing local news, local weather, local advertising, and local public service announcements and other information to reach the local community; public officials to reach their constituents; and local advertisers to reach their potential customer base. Such Congressional action will also strengthen the ability of direct satellite services to compete with cable while maintaining necessary copyright protection for programmers and reinforcement of the service areas of local broadcast stations that is crucial for the preservation of free, over-the-air television for the American public.

Finally, the local-into-local solution is not pie in the sky. Both Echostar and DIRECTV have sufficient spectrum to offer at least some local broadcast service to their customers today.

EchoStar already is. Continuing advances in digital compression and statistical multiplexing will rapidly increase the capacity of such satellite distributors even more and improve their technical ability to retransmit local broadcast signals into their local markets. But only Congress can make the changes to the copyright laws necessary for this to happen legally. And only Congress can incorporate appropriate incentives within those changes that can ensure that it will.

I. The Commission Has No Legal Authority to Expand the Definition of "Unserved Household" That Congress Established in the SHVA.

While the Commission is clearly empowered to initiate proceedings and take actions to administer the Communications Act, it does not have the legal authority to conduct rulemaking proceedings to interpret the *copyright* laws absent a clear Congressional directive to do so. The Commission does not have the legal authority to adopt new, or to modify existing, regulations for the sole purpose of implementing the SHVA, because Congress vested the authority to interpret and enforce the SHVA in the courts, not the FCC.

A. Congress Created Only Narrow Limitations on the Exclusive Rights of Copyright Holders When Enacting the Satellite Home Viewer Act (SHVA)

The SHVA is not part of the Communications Act. Rather, it is an amendment to the copyright laws set forth in Title 17 of the U.S. Code. A fundamental purpose of the copyright

laws of the United States is to protect and preserve the ability of authors of creative content to exploit and control their creations. Congress has carved only very narrow exceptions to the absolute right of program creators and producers to decide how and where to exhibit their works. For example, in recognition of certain public interest benefits that could be derived from the retransmission of broadcast signals by cable operators, Congress created a very limited compulsory license for cable. It is important to note that the statutory provision setting forth this narrow exception to the copyright laws describes it as a "limitation on the exclusive rights" of the program owner,[3] which was enacted only after an extensive analysis and balancing by Congress of the competing rights and interests of the program creators and owners, broadcasters, cable operators, and the viewing public.

Due to its concern over the inability of a small number of television viewers in remote and predominantly rural areas to receive network broadcast stations over the air,[4] Congress again employed the notion of a limited compulsory license. The SHVA establishes an additional narrow limitation on the exclusive right of the program creator to exploit and control its programming, allowing secondary transmission of network broadcast programming by satellite carriers to home satellite antennas for private viewing, but *only* to "persons who reside in

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[3] See 17 U.S.C. §111.

[4] As the Network Affiliated Stations Alliance ("NASA") demonstrated in its comments filed in RM No. 9345, the legislative history of SHVA, as well as the legislative history of its extension in 1994, is replete with references to the need for delivery of network broadcast signals to "rural" areas that would "otherwise be unable to receive network programming available to urban Americans." See NASA Comments in RM No. 9345 at 4-6.

unserved households."[5] Once again, Congress carefully balanced competing interests and rights -- those of the program creators and owners, broadcast networks, local network broadcast affiliates, satellite carriers (or their distributors) and the viewing public -- to develop the parameters of this narrow limitation. The legislative history makes clear that when Congress enacted the SHVA, it *knew* that only a "relatively small number of viewers would quality under the [SHVA] for satellite delivery of broadcast network programming."[6]

B. The Commission Does Not Have The Legal Authority to Substitute Its Judgment and Alter the Careful Balance Struck by Congress in Establishing the "Unserved Household" Standard in the SHVA.

Most basically, the FCC does not have any jurisdiction to administer or enforce the SHVA, and hence no authority to interpret or interfere with the delicate balance struck by Congress in the SHVA. The FCC has no special expertise in the policies of the Copyright Act or in the rights of copyright owners and users governed by that statute. Congress did not direct the FCC to implement any portion of the SHVA. Rather, it is the Copyright Office, not the FCC, that has a role in administering the SHVA, and the courts are vested with responsibility to enforce it. Accordingly, contrary to what NRTC and DIRECTV have argued, there is no basis to

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[5] 17 U.S.C. §119(a)(2)(B). The Commission acknowledges this point in the NPRM, stating "The exception is a *narrow* compulsory copyright license that direct-to-home (DTH) satellite video providers may use for retransmitting signals of a defined class of television network stations 'to persons who reside in unserved household'" (emphasis added). NPRM at 2.

[6] See NASA Comments in RM No. 9335 at 6, quoting testimony before Congress by Ralph Oman, then Registrar of Copyrights, before passage of the SHVA.

assert that the Commission has any delegated or discretionary authority to interpret "Grade B intensity" for SHVA purposes under the doctrine of Chevron U.S.A. Inc. v. NRDC.[7] Chevron applies only to "an agency's construction of the statute which it administers."[8] Because the FCC does not administer the SHVA, it does not have the legal authority to interpret or modify the SHVA or the scope of its application.

There is no question that the modification of the Grade B intensity standard constitutes a modification of the SHVA itself. The "unserved household" definition is the crux of the SHVA because the extent of the compulsory license granted therein depends entirely on the number of households that are "unserved."[9] In establishing the parameters of this copyright exception, Congress was "concerned that changes in technology, and accompanying changes in law and regulation, [would] not undermine the base of free local television service upon which the American people continue to rely."[10] ABC fully agrees with NASA's conclusion that Congress "recognized and acknowledged that the indiscriminate transmission by satellite carriers of duplicating broadcast network programming from distant network stations, if not checked, would undermine the economic foundation of, and ultimately dismantle, the national network/local affiliate distribution system."[11] The Grade B intensity standard adopted by Congress was the means by which indiscriminate retransmissions would be curbed. To modify this standard is to

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7 467 U.S. 837 (1983).

8 Id. at 842.

9 See NASA Comments in RM No. 9345 at 33.

10 H. Rept. No. 100-887(I) at 26 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5577.

11 NASA Comments in RM No. 9345 at 31.

modify the core of the statute, and that is something the FCC is without authority to do.

1. Congress Affirmatively Chose the Existing Grade B Standard, With All of its Flaws, to Define "Unserved Households" and Thus Limit the Scope of the Satellite Compulsory License It Created in the SHVA.

ABC agrees and incorporates herein NASA's analysis and conclusion that the signal strength standards in Section 73.683(a) of the Commission's rules were codified for the purposes of the SHVA, and accordingly, are not subject to revision by the FCC.[12] Congress chose the Grade B standard, as it existed at that time, because it determined that the Commission's existing signal strength standards set the proper balance for the competing interests reflected in the SHVA. But a balancing of interests always involves trade-offs and compromise. The unfortunate result of the imperfections of this standard -- that a small number of viewers may be excluded from receiving network programming -- was deemed outweighed by the public interest benefits associated with the resultant protection afforded to the local network affiliate and copyright owners. Equally significant -- Congress also recognized the need for an objective standard to define the compulsory license, rejecting the satellite carriers' efforts to have a subjective "picture quality" standard incorporated into the SHVA.[13]

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[12] See NASA Comments in RM No. 9335 at 22-26.

[13] The North Carolina federal district court recognized the failed efforts of the satellite industry in convincing Congress that a subjective picture quality test was appropriate. Specifically, the court stated "Although PrimeTime 24 knew of the governing legal standard, it nevertheless chose to adopt one it found more convenient. PrimeTime 24 was broadcasting network programming to thousands of subscribers who received a signal of Grade B intensity as defined by Congress. PrimeTime has simply ignore the Grade B test *even though it tried and failed to persuade Congress to adopt a* [subjective] *test of eligibility based upon subscriber*

In contrast, the imperfections associated with the proposed modifications to the Grade B standard offered by the satellite carriers would allow a very large number of households to receive distant signals duplicating network programming that is already available to them on the local over-the-air broadcast signal. This result is completely at odds with clear Congressional intent and must not be endorsed by the Commission.[14]

Congress chose the existing Grade B standard and codified it in the SHVA. Congress did not direct the FCC to define this standard for the purpose of implementing the SHVA, nor did Congress intend for the FCC to do so. Congress had ample opportunity to clarify any intention that the FCC should modify its definition of "Grade B intensity" but, in fact, never suggested in any way that the FCC should become involved in the administration of the SHVA.

That Congress intended to freeze the existing Grade B standard when it enacted the

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declarations about over-the-air receptions." *ABC, Inc. v. PrimeTime 24, Joint Venture,* 17. F. Supp. 2d 467 (M.D.N.C. 1998) (emphasis added).

[14] There are likely no more than one million "white area" homes eligible for satellite-delivered network service. The Federal Communications Commission, after collecting comments from satellite carriers and other industry groups, concluded that only "800,000 to 1 million households" are in white areas. In the Matter of Inquiry Into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, Gen. Docket No. 86-336, ¶64, 3 FCC Rcd 1202, 1209 (1988). The president of Netlink, one of the largest satellite carriers, testified before Congress that "there are as many as a million households in the United States that are beyond the reach of one or more of their local network affiliates," and that "we all agree that approximately 1 percent or approximately 1 million is the figure" for white area households. Testimony of Brian J. McCanley, President of Netlink USA (Jan. 27, 1988), before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives. Improvements in broadcast television service since 1988 have likely reduced the number of "unserved households." It is noteworthy that the statements of account filed by three of the largest satellite carriers -- PrimeTime 24, Netlink and Primestar -- at the U.S. Copyright Office for June 1998 show approximately *four* million homes receiving satellite-delivered network signals.

SHVA is further supported by the fact that Congress reaffirmed this standard when it enacted limited exemptions to the retransmission consent requirements established in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[15] that allow satellite delivery of network signals to "unserved households." In this law *specifically* designed to foster competition in the distribution of multichannel video programming,[16] Congress augmented the satellite industry's compulsory license in the SHVA by establishing a parallel exemption from the requirements of retransmission consent that allows satellite carriers to retransmit the signal of a network station without the consent of the network or station, but *only to* "unserved households".[17] Had Congress sought to go any further to enhance the ability of satellite distributors to compete with cable television systems, it *easily* could have taken this opportunity to expand the definition of "unserved households" for purposes of the SHVA and the 1992 Cable Act, thus extending the reach of the satellite industry's compulsory license. Congress did not choose to do so.

Instead, in the 1992 Cable Act Congress defined "unserved household" by stating that it should "have the [meaning] given [this] term in Section 119(d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992."[18] Rather than allowing the FCC to redefine this term, Congress chose to maintain

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15 Pub.L.No. 102-385, 106 Stat. 1460 (1992).

16 It bears reminding that the SHVA, as a *copyright* statute, was not intended to foster competition between satellite carriers and cable operators.

17 See 47 U.S.C. § 325(b)(2)(C)(1992).

18 Id.

the careful balance that it had struck in enacting the SHVA and referred instead to the definition already codified.

The fact that Congress specifically chose to refer to its prior codified definition rather than allow the FCC to redefine this term in the context of the implementation of the 1992 Cable Act -- a statute that *was specifically intended* to foster competition to cable operators -- provides all the more compelling reason to conclude that Congress never intended to involve the FCC directly in determining whether a household is "unserved." Rather, Congress established permanent boundaries in the SHVA for the compulsory license created therein by codifying a standard that already existed.

The validity of this conclusion is made even more clear when considering the actions taken by Congress when it extended and modified the SHVA in 1994. As described earlier in the record in this proceeding, in that short time since enactment of the SHVA, disputes between satellite carriers and local broadcast affiliates over the permissible extent of satellite delivery of distant signals had already become widespread.[19] With the issues of administration and enforcement of the SHVA squarely before it, Congress did not tinker with the Grade B intensity standard or seek the FCC's involvement. Congress instead extended the SHVA with the new provision that the satellite carrier has the burden of proving that a household cannot receive a Grade B signal in any SHVA enforcement action.

Had Congress ever intended that the FCC become involved in the administration of the satellite compulsory license, it would have been a simple matter for Congress to direct the FCC

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[19] See NASA Comments in RM No. 9345 at 9.

to better define the Grade B standard for the purposes of the SHVA instead of, or even in addition to, its own codification of a new dispute resolution regime. But both the statute and the legislative history are silent as to any such FCC involvement.

NRTC has suggested that the FCC should not conclude that Congress froze the definition of "Grade B intensity" because Congress could not have intended to "handcuff" the Commission by codifying this standard "forevermore."[20] But the FCC does not administer the SHVA, so codification of a definition in *that* statute does not restrain future FCC administration of its delegated duties under the Communications Act. Moreover, the short answer to the suggestion that Congress could not have intended to freeze forever the Grade B intensity standard for SHVA purposes is that *it didn't*. Indeed, Congress deliberately built a "sunset" into the statute, thereby assuring that Congress itself would have the opportunity periodically to revisit the scope of the satellite compulsory license every time the SHVA is set to expire, when deciding whether to enact legislation to extend it. Thus, at a minimum, every time Congress considers whether to renew the compulsory license it has the opportunity to review the definition of "unserved household" and alter the delicate balance struck in the SHVA if Congress determines that modification is needed.[21]

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[20] Reply of the NRTC in RM No. 9335 at 7.

[21] Indeed, Congress will undoubtedly undertake just such a review when deciding whether to renew the current satellite compulsory license upon its next expiration on December 31, 1999.

2. The Commission Has No Legal Authority to Establish a Separate Grade B Standard Solely for Purposes of Implementing the SHVA.

ABC supports NASA's arguments that Congress intended to codify the existing signal measurement standards set forth in Section 73.683(a) as the objective standard for determining whether a household is "unserved" for purposes of the SHVA. ABC agrees with NASA that the legislative history of the 1994 extension of the SHVA lends support to this conclusion because it specifically references the Grade B standard set forth in Section 73.683(a) of the Commission's rules.[22]

DIRECTV, however, asserts that the current Grade B contours defined in Section 73.683(a) "are to be used only for certain purposes, such as station allotment and interference mitigation."[23] DIRECTV further argues that because the rule itself limits, on its face, use of the established Grade B field strengths to the purposes specified within the rule (i.e., interference mitigation, ownership restrictions, antenna location), a rulemaking is clearly required to define Grade B for the purposes of the SHVA. ABC submits that this interpretation is nonsense. In adopting the SHVA, Congress simply decided that the established Grade B field strength standard should be used for an *additional* purpose. There was no need for the FCC to modify its rule to include this purpose or to otherwise define the Grade B standard for purposes of the SHVA because Congress did not entrust administration of the SHVA to the FCC. Indeed, a

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[22] NASA Comments in RM No. 9335 at 22, citing H.R. Rep. No. 100-887 (II) at 26.

[23] DIRECTV Comments to RM No. 9335 and RM No. 9345 ("DIRECTV Comments") at 16-17.

North Carolina federal district court addressing this very issue ruled as follows:

> Although Section 73.683 concededly was drafted with other purposes in mind, Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term. It is apparent that Congress has done so here. SHVA's reference to "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel.[24]

Congress codified the existing definition -- with all of its imperfections -- in striking the legislative balance it deemed appropriate to create a limited compulsory license for satellite carriers' importation of distant network broadcast signals.

Congress never intended for the FCC to develop a separate definition for the Grade B standard applicable to the SHVA because there was no need for a separate definition. The rationale underlying the establishment of the Grade B intensity standard in the other regulatory contexts already identified in Section 73.683(a) is the identification and protection of the area of service that the FCC expects an allotted station to serve. Congress selected the *same* Grade B intensity standard to set the limits of the satellite compulsory license by allowing satellite delivery of distant network signals only to households located *outside* the area that the local network affiliate station is expected, under the FCC rules, to serve.

Simply stated, Congress intended that the Grade B intensity standard used by the FCC to establish the area that a local station is expected to serve without interference from any adjacent local stations should also be used to establish the location of households for which that same local station's copyrighted programming would be protected from distant signal importation of

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[24] ABC, Inc. V. PrimeTime 24, at 13 (M.D.N.C. July 16, 1998), at 13.

duplicative network programming.

Moreover, it is clear that Congress intended that the local broadcast network affiliate would be protected from distant signal importation to all households located within the full coverage area afforded by the Grade B intensity standard, because if Congress had intended to make any additional households eligible to receive distant network signal importation, it could have used the already existing *Grade A* standard.

3. The Commission Has No Legal Authority to Establish a Predictive Model for Identifying "Unserved Households."

The SHVA expressly adopts an objective test to determine whether a household is "unserved" -- the measurement of the signal strength of the local network affiliate station at the particular household in question-- and places jurisdiction in the courts to decide whether infringement has occurred. The comments filed previously in this proceeding by NASA discuss at length the issue of a predictive standard, and ABC incorporates herein NASA's arguments that the FCC does not have the legal authority to adopt or impose any predictive standard.[25]

The Commission itself acknowledges that the SHVA explicitly imposes on the satellite carrier the burden of proving that an individual household is eligible to receive secondary transmissions by a satellite carrier of a network affiliated station.[26] ABC submits that nothing in the statute suggests that this burden can be met by anything less than a specific showing that each

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[25] See NASA Comments in RM No. 9345 at 15-18.

[26] Notice at 3, citing 17 U.S.C. 119 (a)(5)(D).

individual household that receives an imported distant network signal meets the statutory definition of "unserved."[27]

The NPRM mentions that individual parties -- certain broadcasters or broadcast groups and certain satellite carriers -- have utilized an agreed-upon predictive methodology to identify households meeting the statutory definition of "unserved," instead of requiring the satellite carrier to measure each applicable broadcast signal at each individual household as an initial requirement of providing service.[28] ABC points out that this is simply a means of complying with the statutory limitations of the compulsory license to the satisfaction and mutual benefit of the parties involved. The use of any such predictive methodology as a convenient means of compliance can be negotiated in good faith by such parties.

No use of any predictive methodology, however, was suggested or adopted by the SHVA, and nowhere in the SHVA did Congress instruct or even authorize the FCC to impose or sanction any such practice. While private parties are free to negotiate predictive solutions that promote compliance with the copyright protections maintained in the SHVA to their mutual convenience

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[27] Indeed, this meaning is made absolutely clear by the specific obligation included in the SHVA that each satellite carrier making secondary transmissions of a primary transmission by a network station pursuant to the SHVA compulsory license must submit to each network a list of all subscribers receiving any such secondary transmissions from the satellite carrier, which must be updated on the 15th of every month, specifying the name and street address (including county and zip code) for each of these subscribers. The SHVA states on its face that this notification requirement is imposed for the purpose of monitoring satellite carrier compliance with the statutory limitations of providing such transmissions *solely* to "unserved" households. See 17 U.S.C. § 119(a)(2)(C).

[28] See NPRM at note 53.

and benefit,[29] the FCC does not have any statutory authority to dictate the use of predictive models in general or to endorse one particular predictive model over any other. Because the SHVA is a copyright statute that does not involve any administration by the FCC, the FCC does not have the authority to adopt, impose or approve any prediction methodology for the sole purpose of demonstrating compliance with the SHVA.

The Commission points out in the NPRM that satellite carriers respond to this argument by citing the Commission's current use of predictive methodologies for other purposes.[30] ABC responds, however, that the Commission uses such predictive methodologies to administer responsibilities specifically delegated to the FCC by Congress in the provisions of the *communications* act. No such authority or responsibility was conferred upon the FCC by virtue of passage of the SHVA. Here the issue is not agency administration, but private parties' compliance with a statutory requirement. It is ludicrous to suggest that, notwithstanding the "household"-specific language of the SHVA, the Commission can declare ipse elixit that a party complying with some predictive model is therefore acting within the law.

Even more unacceptable than requests that the Commission revise its rules to mandate use of a predictive measurement methodology without the legal authority to do so is an outrageous proposal from EchoStar that the Commission has referenced in the NPRM.[31] In the

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[29] Of course, courts also are free to employ predictive methodologies when fashioning appropriate equitable remedies in the exercise of their statutory jurisdiction to enforce the SHVA, as the federal district court did in Miami in its preliminary injunctive order.

[30] NPRM at 12.

[31] See NPRM at note 76.

context of the Miami litigation, EchoStar has proposed a signal strength test whereby the satellite carrier measures only the signal strength of the "one local station that the consumer watches most often"[32] to determine whether the household is "unserved" and therefore eligible to receive *a package* of distant network signals from the satellite carrier.

It is clear from the express language of the SHVA that any measurement of the signal strength of *one* local broadcast signal is insufficient to allow the importation of *multiple* distant network signals or signals from different networks to such household. When adopting the SHVA, Congress was very cognizant of protecting the rights of *each* local broadcast network affiliate. If a scheme such as that proposed by EchoStar would have been sufficient to comply with burden of establishing that a household is "unserved," then Congress would not have defined the term "unserved household" in terms of an individual "primary network station affiliated with *that* network."[33] Accordingly, any proposal that suggests that the signal strength of only one local network affiliate signal need to measured in order to determine that a household is "unserved" for purposes of receiving an *entire package* of distant signals for all networks is fatally flawed, *regardless* of the jurisdictional, issues because such a proposal is clearly insufficient to comply with the express requirements of the SHVA.

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32 Id.

33 See 17 U.S.C. §119(d)(10)(emphasis added).

II. Even if the Commission Did Have the Requisite Legal Authority to Adopt a New Grade B Definition That Would Be Used Solely for the Purpose of Implementing the SHVA, There Are No Compelling Public Interest Reasons to Do So.

ABC believes that there is no compelling reason why the FCC should step in at this time and condone or sanction the bad faith practices of the satellite industry. The National Association of Broadcasters ("NAB") and NASA have adequately documented the practices of PrimeTime 24 in aggressively marketing its service as a supplemental service offering time shifting and out-of-market sports programming -- action clearly beyond the scope of the limited compulsory license that enables it to import a distant network signal only to "unserved households" and in blatant violation of the SHVA.[34] The record already existing in this proceeding clearly describes the egregious behavior of PrimeTime 24 leading to the litigation that has spurred to the petitions filed by NRTC and EchoStar.

For example, in a lawsuit brought by broadcasters and networks against PrimeTime 24 in federal district court in Miami, the court recently granted a temporary restraining order barring the carrier from selling network signals to ineligible households. This relief was based on the court's findings that (1) "PrimeTime 24 knew of the governing [Grade B] legal standard, but nevertheless chose to circumvent it," and (2) that the "evidence establishes a likelihood of success proving that PrimeTime 24 wilfully and repeatedly rebroadcast copyrighted network

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[34] See Preliminary Response of the National Association of Broadcasters to Emergency Petition for Rulemaking Filed by the National Rural Telecommunications Cooperative ("NAB Preliminary Response") at 27-30; NASA Comments in RM No. 9335 at 10-14.

programming to served households in violation of the SHVA."[35]

In addition, the North Carolina federal district court has found that of 35,000 customers served by PrimeTime 24 in the Raleigh-Durham broadcast market, PrimeTime 24 was able to show that only *five* of them could not receive a signal of Grade B intensity -- thus, only *five* of these 35,000 customers was legally qualified for distant signal importation.[36] The court also found that "there is no genuine dispute that PrimeTime 24 engaged in a wilful or repeated pattern or practice of transmitting ABC programming to households ineligible for such service under the [SHVA], and thus ABC is entitled to judgment as a matter of law on its claim of copyright infringement."[37]

The Commission should not reward such egregious misbehavior. Moreover, any possible "clarification" of any plausible "confusion" in the Grade B standard that the Commission could provide in this proceeding would not come close to mitigating the North Carolina federal district court's finding of *gross negligence* on the part of PrimeTime 24. Indeed, the Commission has already acknowledged that any modification it could make to the Grade B standard would have little impact on the results of the current litigation.[38] The Commission already knows that there is little room for any special definition of "Grade B intensity" for the satellite industry given the

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[35] *CBS, Inc. v. PrimeTime 24 Joint Venture,* Case No. 96-3650-CIV-NESBETT (S.D.Fla. May 13, 1998) at 29-30 (included as Exhibit C in NASA Comments to RM No. 9335).

[36] *ABC, Inc. v. PrimeTime 24, Joint Venture,* CIV No. 1:97CV00090 (M.D.N.C. Aug.19, 1998) Order, Judgment, and Permanent Injunction (included as Exhibit B in NASA Comments to RM No. 9335) at 27-31.

[37] Id.

[38] NPRM at 9.

existence of the Grade A standard and the constraints it places on any modified definition of Grade B.

In fact, EchoStar and NRTC have asked the Commission to act, without authority, to settle a dispute that they have refused to settle themselves. The claim by EchoStar and NRTC that they seek certainty in this area is disingenuous. They could have had resolution and certainty by participating in the voluntary inter-industry compliance and enforcement program.[39] Instead they want the Commission to adopt -- without authority -- rules that codify their extreme positions that were rejected in efforts at compromise, and essentially condone their participation in bad faith business practices.

While the loss of satellite-delivered network programming to a significant number of consumer households resulting from judicial enforcement of the SHVA may have some superficial appeal as a basis for FCC intervention, such intervention would be wrong because it would reward illegal behavior. Moreover, the vast majority of households that would lose satellite-delivered network programming can receive the local network signal. As NASA has pointed out, "By definition, subscribers who have been illegally provided network service are able to receive at least a Grade B signal off-the-air- from a local network affiliate. Therefore, those subscribers will continue to receive network service -- and receive it for free!"

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[39] See NASA Comments in RM No. 9345 at 10-11.

III. The Ultimate Resolution of this Controversy is for Congress to Authorize Satellite Carriers to Retransmit the Signals of Local Broadcast Television Stations Within Their Local Markets.

Because of the substantial issues that have been raised about its authority to act, any FCC action in this proceeding will do nothing but add further layers of uncertainty and complexity in an area of law in which those qualities have already been too prevalent.

Nor is there need for such action. Because the SHVA expires as of December 31, 1999, Congress must adopt legislation to extend the license. Any such legislation will undoubtedly involve Congressional attention to, and legislative resolution of, the complex issues raised in the NPRM. While ABC believes that it is clear that the Commission has no authority to adopt any modifications to the current definition of "unserved households," the record shows that others believe that the Commission is somehow empowered to act. Considering the substantial controversy in this proceeding over the Commission's authority to act, and in light of the fact that Congress *must* act in the near future, it seems unwisely premature for the Commission to adopt regulations that would attempt to modify the definition of "unserved households." Equally important, even if authority could be sustained, any FCC action taken here would be at best a short-term Band-Aid. Only Congress can forge the most sensible solution to the vexing problems presented by SHVA enforcement through the deliberative process of legislation.

In addition, any action that the Commission might consider taking would have little if any effect on the current status of competition between satellite carriers and cable operators for some time, because the second prong of the definition of "unserved household" set forth in the SHVA specifies that if a particular household has "subscribed to a cable system that provides the

signal of a primary network station affiliated with [the network that is to be imported through satellite subscription]," that household is not eligible to "receive secondary transmissions by a satellite carrier of a network station affiliated with that network" for a period of *90 days*.[40] The record in this proceeding has already demonstrated that *97%* of American households are passed by cable,[41] suggesting a strong likelihood that this provision would inhibit the ability of a great number of the households at issue in this proceeding to switch from cable to satellite service even if the Commission *did* modify its rules. This mandatory delay could quite possibly discourage many such households from choosing to switch to satellite service. Once again, Congressional action is necessary to resolve this issue.

A. The Local-Into-Local Solution is Better for Everyone.

As stated earlier in these comments, ABC supports the goal of providing every American household with access to network broadcast programming. There are two ways to achieve this goal: (1) adopt laws and regulations that make it easier for consumers to get the *wrong* network signals (distant signals imported into a local market that erode the economic base of that market's local affiliate) by eroding the Grade B standard, or (2) make it easier for consumers to get the *right* network signals (local signals) by allowing, and even incenting, satellite delivery of local network affiliate signals into the local market.

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40 17 U.S.C. § 119(d)(10).

41 See NASA Comments in Rm No. 9335 at 36-37.

ABC submits that the "local-into-local" solution is better for everyone. Consumers would rather receive local news, local weather, local public service announcements and local advertising. The survival of free broadcast stations would be fostered because satellite delivery of their signal into their local service area would perfect their distribution rather than erode it. Copyright owners win because their market-by-market sales plan is reinforced, not undermined by an overly-expansive compulsory license. Public officials are better served because their communications with local constituents are enhanced rather than diminished. And the goal of enhancing competition to cable is advanced because satellite multichannel distributors will provide better competition to cable if they include delivery of the local broadcast signals.

Allowing a satellite carrier to import distant signals should be the last resort alternative used to provide consumers with broadcast network service. In order to preserve the existence of free, over-the-air broadcasting, the integrity of the network/local affiliate system must be protected by minimizing the importation of distant network signals, and enabling and maximizing the marketplace incentives for retransmission of local network signals.

B. The Local-Into-Local Solution is Technologically Feasible.

Both DIRECTV and EchoStar have the capability to offer local broadcast signals to their customers. Continuing advances in digital compression and statistical multiplexing will rapidly increase the capacity of such satellite distributors and improve their ability to retransmit local broadcast signals into their local markets. EchoStar is already doing so in some markets, and its recent purchase of the high power assets of MCI WorldCom-News Corp. -- providing EchoStar

with 28 high-power transponders at 110° in addition to its existing 21 transponders at 119°, all of which can be received with the *same* small dish by consumers -- will only increase its ability to offer local broadcast signals in more markets.[42] Moreover, EchoStar has also been granted Ka band spectrum that could be used for local signal "spot beams" that could be received by the same satellite dish that their customers use today because the Ka frequencies assigned to EchoStar are at the same orbital location as that at which they operate today.[43]

If DIRECTV chose to do so it is also capable of delivering local broadcast signals into their local markets. Like EchoStar, DIRECTV has been granted a block of Ka spectrum at the same orbital location where they operate today, which could allow them to deliver local broadcast signals through "spot beams" that could be received by their customers using the same satellite dish they would use today. Moreover, DIRECTV is currently seeking even more spectrum from the Commission in the 17.3-17.8 GHz Frequency Band to increase its overall

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[42] See Communications Daily, Vol.18, No. 230 (December 1, 1998) at 1.

[43] See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 11 FCC Rcd. 13788 (Int'l Bur. 1996); Assignment of Orbital Locations to Space Stations in the Ka-Band, 12 FCC Rcd.22004 (Int'l Bur. 1997); and Assignment of Orbital Locations to Space Stations in the Ka-Band, 13 FCC Rcd. 1030 (Int'l Bur. 1997).

satellite capacity.[44] DIRECTV has the capacity to offer local broadcast signals to DIRECTV customers. If it chooses not to do so, that is DIRECTV's business decision. But such a business decision should not be confused with a technological competitive handicap that warrants regulatory assistance in the form of continuation -- much less *expansion* -- of a compulsory copyright license that infringes on the rights of local network broadcast stations.

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[44] See proposals and comments filed in the current FCC proceeding In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite Service Use (IB Docket No. 98-172).

CONCLUSION

For the foregoing reasons, ABC respectively urges the Commission not to take any action that would attempt to modify the Grade B standard with respect to the implementation of the SHVA.

Respectfully submitted,

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